illegal purpose being a "matter of aggravation." This is answered by the finding that the corporation did not have the power to dominate, but the court goes on to say, "the law does not make mere size an offense, or the existence of unexerted power an offense. It requires . . . overt acts." Does the court mean that if the Steel Corporation had achieved dominating power, it would still have been saved from dissolution because the power had not been used? If so, why should emphasis have been placed on the fact that the corporation was not a monopoly? The second aspect is the discussion of the usual powers of discretion of a court of equity in determining what remedy, if any, shall be given. Does the court mean that having found the Steel Corporation to be within the prohibitions of the Sherman Act, the court may, in its discretion, deny a remedy? The existence of discretion when equitable jurisdiction is conferred by statute was denied in the Paper Bag Patent case,[8] where the court enjoined infringement of a patent acquired by the plaintiff to protect his monopoly by keeping the invention out of the market. If there is no discretion under the patent statute, which was merely declaratory of the common-law jurisdiction of equity, it would seem even clearer that there is no discretion under the Sherman Act, which creates a new equitable jurisdiction. The principal case throws doubt on the holdings in the patent cases.

It was unfortunate that a decision of such importance should have been handed down by less than the full court, for the majority in the case is a minority of the court. The decision cannot be relied on as a precedent with safety.

PRICE RESTRICTION ON THE RESALE OF CHATTELS. — Two recent cases [1] before the Supreme Court of the United States have raised again, in somewhat different form, the question of attempted price maintenance on the resale of chattels — condemned in the well-known case of *Dr. Miles Medical Co.* v. *Park & Sons*.[2] In each of these late cases a manufacturing corporation was indicted under Section 1 of the Sherman Anti-Trust Law.[3] The substance of the activity of the defendant in each instance was an attempt to establish a uniform price for resale by the dealers to whom it sold that product. In neither of the cases was it charged that the defendant had monopolized or attempted to monopolize any part of its industrial field. In each case the defendant manufactured "branded," or "specialty," goods.

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[8] 210 U. S. 405 (1907).

[1] United States *v.* Colgate & Co., 250 U. S. 300 (1919); United States *v.* A. Schrader's Son, Inc., U. S. Sup. Ct., No. 567, Oct. Term, 1919 (March 1, 1920). See RECENT CASES, page 986.

[2] 220 U. S. 373 (1911). While the court in this case had before it only the question of whether a covenant to maintain prices on resale could be enforced against third persons who took the chattel with notice of the covenant, the court based its denial of relief on the ground that the contract was illegal as in restraint of trade.

[3] Sherman Act of July 2, 1890, c. 647, § 1; 26 STAT. AT L. 209. "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . ."

In one of the two cases, *United States* v. *Colgate & Co.*,[4] the defendant accomplished this purpose by giving the dealers notice of the uniform prices to be charged for the goods and informing them that in case of departure from the specified prices no more goods would be sold to them. To this policy the defendant vigorously and rigidly adhered, with the result — as the indictment charged — that a uniform price of resale was maintained. Upon a demurrer, it was held that this indictment failed to charge any offense. In the case of *United States* v. *A. Schrader's Son, Inc.*,[5] a similar maintenance of resale price was attained by means of contracts between the defendant and the dealers. The trial court sustained a demurrer to the indictment on the ground that the Dr. Miles case had been overruled by the Colgate decision. The trial court pointed out that, in its opinion, there was no real difference upon the facts between the cases, and said: [6] "The only difference is that in the former [the Miles case] the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the price fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement." This decision of the trial court was, however, reversed by the Supreme Court, Mr. Justice Holmes and Mr. Justice Brandeis dissenting, with Mr. Justice Clarke concurring only in the result.

In view of the opinion of the court below, and of the dissent, the Supreme Court seems almost cavalier in the statement: "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements — whether express or implied from a course of dealing or other circumstances — with all customers throughout the different States which undertake to bind them to fixed resale prices." [7] The business result of the two methods is the same, and if contracts to the end in question fall within the prohibition of the Sherman Law, it is to be remembered that that prohibition is not limited to "contracts" but extends to "combinations" and "conspiracies." But the court even blurs the technical line which it draws between contract and no contract with its talk concerning agreements "implied from a course of dealing or other circumstances." What the decision of the court would be, for instance, in the case of an agreement by a manufacturer to give a rebate to the dealers who maintained his uniform prices, seems quite uncertain.[8]

The decision in the Miles case has been ably and, it is believed, deservedly criticized.[9] Practically all other courts in which the question

[4] *Supra*, note 1.

[5] *Ibid.*

[6] Opinion quoted on page 3 of Supreme Court's opinion.

[7] Page 5 of the opinion.

[8] Such agreements were uniformly upheld before the decision in the Miles case. *In re* Greene, 52 Fed. 104 (1894); Clark *v.* Frank, 17 Mo. App. 602 (1885); Park & Sons *v.* Nat'l Wholesale Druggists Ass'n, 175 N. Y. 1, 67 N. E. 136 (1903).

[9] See KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE (Summary), Chap. IV. See also Charles L. Miller, "The Maintenance of Uniform Resale Prices," 54 U. OF PA. L. REV. 22.

had been raised had reached the contrary result.[10] Subsequent decisions in state courts have refused to follow it.[11] The undesirability, as a matter of economics, of the predatory price-cutting to which the decision gave rise, can scarcely be denied.[12] Yet perhaps the case has become too firmly fixed as a principle of decision in the federal courts to make it desirable to overrule it at this late date and perhaps the remedy is now rather for the legislature.[13] But even so, that is not a valid reason for introducing a new technical distinction into a field of judicially interpreted public policy which has already become stigmatized by an adherence to the letter rather than the spirit. Having decided the Colgate case as it was decided, it seems unfortunate that the Supreme Court did not go the full distance and overrule the Miles case. As the decisions stand, the Colgate case is an exception to an undesirable rule, and the existence of a bad rule has been prolonged altogether too often in the law by the multiplication of virtuous exceptions.

THE CONCURRENT POWER OF CONGRESS AND THE SEVERAL STATES TO ENFORCE THE EIGHTEENTH AMENDMENT. — The Eighteenth Amendment[1] prohibits traffic in "intoxicating" liquors and provides that "Congress and the several States shall have concurrent power to enforce" the prohibition. There is a dispute as to the significance of the phrase "concurrent power," and more particularly as to who has the power to define "intoxicating." Litigation on these points seems certain to arise out of the legislation of at least four states,[2] which has set a standard at variance with that adopted in the National Prohibition Act.[3]

Three views are possible: (1) That concurrent power means joint power. (2) That the power is given to each, the legislation of either Congress or the states being of equal force with the other. (3) That the power is in each, but that the legislation of Congress, as the supreme law of the land, will supersede any inconsistent state legislation.

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[10] Elliman Sons & Co. *v.* Carrington & Son, L. R. 2 Ch. 275 (1901); Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174 (1900); New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302 (1861).

[11] Ghirardelli Co. *v.* Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Fisher Flour Milling Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

[12] An enlightening account of this economic effect can be found in the hearings on the Stevens Bill (H. R. 13305) before the Committee on Interstate and Foreign Commerce in the House of Representatives, 63rd Congress, 2nd and 3rd Sessions (Feb. 27, 1914, to Jan. 9, 1915).

[13] See the opinion of Mr. Justice Brandeis in Boston Store of Chicago *v.* American Graphophone Co., 246 U. S. 8, 27 (1918).

[1] See 40 STAT. AT L. 1050. For the purposes of this note the validity of the amendment itself is assumed. See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223; William L. Frierson, "Amending the Constitution of the United States," 33 HARV. L. REV. 659. Power to define "intoxicating" under the power to enforce is also assumed. *Cf.* Ruppert *v.* Caffey, 251 U. S. 264 (1920).

[2] Maryland, New Jersey, New York, and Massachusetts. Maryland's statute is expressly conditioned on its validity under the amendment. New York and Massachusetts have bills pending.

[3] Volstead Act, October 28, 1919.